No. 6891

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY K. PERSONIUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court, for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, District Judge

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Filed ....., 1932.

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STATEMENT OF THE CASE

The single point involved in this case is whether or not the Court committed error in sustaining a demurrer, in its nature special, to the complaint on file herein. This in turn involves the sole question as to whether a veteran can recover under a war risk insurance policy where he was permanently disabled and also totally disabled for a continuous period of more than ten years, and then recovers from his total disability, but not from his permanent disability.

The complaint (Ts. 11-16) sets out the following facts:

(a) That the plaintiff was a resident of Idaho.

(b) That the action was brought under the terms of the War Risk Insurance Act.

(c) That the plaintiff served in the United States Army from the 16th day of June, 1916, until the 27th day of September, 1920.

(d) That he applied for two policies of war risk insurance in the amount of $5,000.00 each, and that the application was made in November, 1917.

(e) That the certificates evidencing said insurance were issued, but have been lost.

The necessary jurisdictional fact concerning a disagreement is alleged (Ts. 14). The only allegation out of the ordinary is that contained in Paragraph VI of the complaint, and in Paragraph VI it is set out that on October 31, 1918, the plaintiff suffered a severe injury while engaged in armed combat with the armed forces of the Central Powers, and that he became afflicted with osteomyelitis and other disabilities, and it is then set forth:

> "And the plaintiff has continuously suffered from and been afflicted with said injuries and diseases from October 31, 1918, and this plaintiff is informed and believes, and upon information and belief alleges the fact to be that as a result of said injuries and diseases the said plaintiff became and was, on Octo-

ber 31, 1918, and during the time said insurance was in full force and effect, totally disabled, and that such total disability was founded upon conditions which made it reasonably certain that it would continue throughout his life and that he was totally and permanently disabled from October 31, 1918, until January 1, 1929." (Ts. 13-14).

To this complaint and to each cause of action thereof, the defendant interposed a demurrer as follows:

> "That the first cause of action of plaintiff's complaint does not set forth facts sufficient to constitute a cause of action against this defendant, in this: That it appears on the face of the complaint as pleaded in said first cause of action, that the plaintiff is not now, and that he never has been, permanently and totally disabled, but that the diseases as set forth in Paragraph VI of said first cause of action were only temporarily disabling." (Ts. 16).

Paragraph II of the demurrer directed to the second cause of action is in the exact words above quoted. This demurrer was submitted to the Court and by the Court upon the 26th day of May, 1932, was sustained (Ts. 20). The plaintiff declined to plead further (Ts. 17), and on June 7, 1932, the Court entered a judgment of dismissal of the complaint (Ts. 18-19). Exceptions were duly preserved (Ts. 18-19-20) and the appeal duly taken.

SPECIFICATIONS OF ERROR.

We believe that we can clearly and understandingly state our position by making specifications of the points upon which we rely and under each specification refer to the assignments of errors pertaining thereto and by which the point is raised.

SPECIFICATION NO. 1.

THAT THE COURT ERRED IN RULING THAT THE COMPLAINT DID NOT STATE A CAUSE OF ACTION AND IN SUSTAINING DEFENDANT'S DEMURRER AND IN DISMISSING THE COMPLAINT.

First Assignment.

That the trial court erred in ruling and holding that the complaint in the above entitled cause did not state a cause of action (Ts. 23).

Second Assignment.

That the trial court erred in sustaining the demurrer to the complaint (Ts. 24).

Third Assignment.

That the trial court erred in entering a judgment of dismissal (Ts. 24).

Fourth Assignment.

That the trial court erred in dismissing the complaint herein.

POINTS AND AUTHORITIES.

SPECIFICATION NO. 1.

THAT THE COURT ERRED IN RULING THAT THE COMPLAINT DID NOT STATE A CAUSE OF ACTION AND IN SUSTAINING DEFENDANT'S DEMURRER AND IN DISMISSING THE COMPLAINT.

PROPOSITION OF LAW NO. 1.

THIS BEING AN APPEAL FROM AN ORDER SUSTAINING A DEMURRER TO A COMPLAINT. THE COMPLAINT MUST BE CONSTRUED MOST FAVORABLY TO THE PLAINTIFF.

Paragraph 724, Title, 28, U. S. C. A., R. S. 914.

Section 6701, Idaho Compiled Statutes of 1919 (Section 5-801 Idaho Code Annotated, 1932 edition).

Sommer v. Carbon Hill Coal Co., 89 Fed. 54 (9 C. C. A.)

U. S. v. Parker, 120 U. S. 89, at 94, 7 Sup. Ct. 454.

PROPOSITION OF LAW NO. 2.

VETERANS' POLICIES AND THE STATUTES AND REGULATIONS APPLICABLE THERETO SHOULD BE GIVEN A LIBERAL CONSTRUCTION IN FAVOR OF THE SOLDIER.

U. S. v. Sligh, 31 Fed. (2d) 735.

U. S. v. Worley (C. C. A. 8th) 42 Fed. (2d) 197.

U. S. v. Phillips (C. C. A. 8th) 44 Fed. (2d) 689.

Quirk v. U. S., 45 Fed. (2d) 631.

U. S. v. Cox, 24 Fed. (2d) 944.

Starnes v. U. S., 13 Fed. (2d) 212.

PROPOSITION OF LAW NO. 3.

THE WORD "PERMANENT" AS CONSTRUED BY THE COURTS DOES NOT MEAN UNENDING OR ABSOLUTE OR FOREVER.

Texas & Pacific Railroad v. City of Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385.

Mead v. Ballard, 7 Wall. 290, 74 U. S. 290, 19 L. ED. 190.

Soule v. Soule, 4 Cal. App. 97, 87 Pac. 205.

PROPOSITION OF LAW NO. 4.

THE PROVISIONS IN THE ACTS OF CONGRESS AND IN THE REGULATIONS PROVIDING FOR THE RESUMPTION OF THE PAYMENT OF PREMIUMS IN THE EVENT OF RECOVERY FROM PERMANENT AND TOTAL DISABILITY CLEARLY MEAN THAT THE WORD 'PERMANENT" AS USED IN THE INSURANCE DOES NOT MEAN ALWAYS.

Congressional Record of the 65th Congress, Volume 55, page 6901.

40 Stat. at Large 409.

Century Dictionary and Cyclopedia, Volume 3, page 1802.

Webster's New International Dictionary, page 685.

Paragraph 512, page 248 of Title 38, U. S. C A.

Regulations and Procedure of the United States Veterans Bureau, Volume 2, pages 1241 to 1273, Bulletin No. 3.

Regulations and Procedure, United States Veterans Bureau, Part 1, page 9.

Regulation No. 57, Part I, Regulations and Procedure, United States Veterans Bureau, page 54.

Penn Mutual Life Insurance Company v. Milton, 127 S. E. 140.

Wenstrom v. Aetna Life Insurance Company, 215 N. W. 93.

ARGUMENT.

THAT THE COURT ERRED IN RULING THAT THE COMPLAINT DID NOT STATE A CAUSE OF ACTION AND IN SUSTAINING DEFENDANT'S DEMURRER AND IN DISMISSING THE COMPLAINT.

In as much as all of our assignments of error relate to the ruling of the trial court in holding that the demurrer should be sustained and in the dismissal of the action as a result of that ruling, we believe that it would serve no

useful purpose to discuss the various assignments of errors separately, and that the points raised may be considered under the above and foregoing specification of error.

It will be observed that in Paragraph VI of the complaint (Ts. 13) that the plaintiff alleges that during the time the policy was in force, and on October 31, 1918, he was severely injured and also alleges that on October 31, 1918, he became totally disabled and that such total disability was founded upon conditions which made it reasonably certain that it would continue throughout his life, and that he was totally and permanently disabled from October 31, 1918, until January 1, 1929 (Ts. 13-14). The demurrer filed attempts to specify wherein the complaint is defective, and after alleging that the complaint does not set forth facts sufficient to constitute a cause of action, it states as follows:

> "In this: That it appears on the face of the complaint as pleaded in said first cause of action, that the plaintiff is not now, and that he never has been, permanently and totally disabled, but that the diseases as set forth in Paragraph VI of said first cause of action were only temporarily disabling." (Ts. 16).

This demurrer, of course, does not clearly set forth the facts as contained in the complaint, because it does not appear from the complaint that the injuries suffered by the plaintiff were "only temporarily disabling," but on the other hand it does appear from the complaint that the

plaintiff was permanently injured, because the complaint alleges injuries which are in their very nature permanent and in addition states:

> "And the plaintiff has continuously suffered from and been afflicted with said injuries and diseases from October 31, 1918." (Ts. 13).

And in addition the complaint sets forth very clearly that on October 31, 1918, the plaintiff became totally disabled and then charges permanent disability in the words of the policy as found in Regulation No. 11, which regulation has been the basis for the determination of total and permanent disability in every single case that has been decided involving war risk insurance, and is a part of the contract, and the complaint alleges that the plaintiff's total disability which he suffered on October 31, 1918, "was founded upon conditions which made it reasonably certain that it would continue throughout his life and that he was totally and permanently disabled from October 31, 1918, until January 1, 1929."

Undoubtedly the view of the defendant ,which view the trial court adopted, is that under the contract of insurance it was impossible for the plaintiff ever to have been totally and permanently disabled if he is not now totally and permanently disabled. We believe that this view violates the terms of the statutes providing for war risk insurance, and the regulations governing the same, which statutes and regulations are in fact parts of the policy.

PROPOSITION OF LAW No. 1.

THIS BEING AN APPEAL FROM AN ORDER SUSTAINING A DEMURRER TO A COMPLAINT, THE COMPLAINT MUST BE CONSTRUED MOST FAVORABLY TO THE PLAINTIFF.

Under the Conformity Act, paragraph 724, Title 28, U. S. C. A., R. S. 914, the practice, pleadings and forms and modes of proceedings in this case must conform as near as may be to the practice, pleadings and forms and modes of proceeding in the State of Idaho, the district in which this case arose.

Section 6701 of the Idaho Compiled Statutes of 1919, (Section 5-801 Idaho Code Annotated, 1932 edition,) is as follows:

> "PLEADINGS LIBERALLY CONSTRUED.
>
> In the construction of the pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties."

This court in passing upon a case arising in the State of Washington, which has similar code provisions to the State of Idaho, in speaking of a provision of the Washington Code, which is in exactly the same words as the above quoted section of the Idaho Code, said:

> "This rule of construction, contrary to that established by the common law, requires that every reasonable intendment and presumption is to be made

in favor of the pleading; and it will not be set aside on demurrer unless it be so fatally defective that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever."

Sommer v. Carbon Hill Coal Co., 89 Fed. 54 (9 C. C. A.)

See also U. S. v. Parker, 120 U. S. 89, at 94, 7 Sup. Ct. 454.

PROPOSITION OF LAW NO. 2.

VETERANS' POLICIES AND THE STATUTES AND REGULATIONS APPLICABLE THERETO SHOULD BE GIVEN A LIBERAL CONSTRUCTION IN FAVOR OF THE SOLDIER.

This court in the Sligh case held:

"These policies and the statutes applicable to the same are entitled to a liberal construction in favor of the soldier."

United States v. Sligh, 31 Fed. (2d) 735.

See also:

United States v. Worley (C. C. A. 8th) 42 Fed. (2d) 197.

United States v. Phillips (C. C. A. 8th) 44 Fed. (2d) 689.

Quirk v. United States, 45 Fed. (2d) 631.

United States v. Cox, 24 Fed. (2d) 944.

Starnes v. United States, 13 Fed. (2d) 212.

PROPOSITION OF LAW No. 3.

THE WORD "PERMANENT" AS CONSTRUED BY THE COURTS DOES NOT MEAN UNENDING OR ABSOLUTE OR FOREVER.

In approaching a solution of the problem as to what is meant in the various statutes by the words "permanent disability" or "total and permanent," it will be remembered that the word "permanent" as used in contracts is not construed in its literal sense, but is construed in its ordinary sense. For example, we speak of a person as having a permanent position. This does not mean that such person has a position that he will occupy the rest of his life. We likewise speak of persons as being permanently located at a certain place, city or town. This does not mean that they are anchored there forever and must stay there until they die.

The United States Supreme Court has repeatedly held that the word "permanent" does not mean forever. Where a city made a large donation of bonds upon the condition that the railroad company would permanently establish certain improvements at a certain place, and it appeared that a terminus had been established and been maintained for eight years, the United States Supreme Court said:

> "This was the establishment at that point of the things contracted for in the agreement. It was the fair meaning of the words 'permanent establishment,' as there was no intention at the time of remov-

> ing or abandoning them. The word 'permanent' does not mean 'forever,' or lasting forever, or existing forever. The language used is to be considered according to the nature and its relation to the subject matter of the contract, and we think that these things were permanently established by the Railway Company."

See Texas & Pacific Railroad vs. City of Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385.

See also Mead v. Ballard, 7 Wall. 290, 74. U. S. 290, 19 L. Ed. 190.

In Soule v. Soule, 4 Cal. App. 97, 87 Pac. 205, it is held that the word "permanent" is not the equivalent of perpetual, or unending or lifelong or unchangeable.

Certainly the pleadings in this case show that the plaintiff was suffering from a chronic condition which renders a man totally disabled and which, as is shown by the complaint, has continued over a long period of years, is a permanent condition that is based upon conditions that render it reasonably certain that it will last throughout the life of the person afflicted with it.

PROPOSITION OF LAW NO. 4.

THE PROVISIONS IN THE ACTS OF CONGRESS AND IN THE REGULATIONS PROVIDING FOR THE RESUMPTION OF THE PAYMENT OF PREMIUMS IN THE EVENT OF RECOVERY FROM PERMANENT AND TOTAL

DISABILITY CLEARLY MEAN THAT THE WORD "PERMANENT" AS USED IN THE INSURANCE DOES NOT MEAN ALWAYS.

The trial court ruled that because the complaint alleged that the plaintiff was totally and permanently disabled from October 31, 1918, until January 1, 1929, that the complaint did not state a cause of action, notwithstanding the fact that the complaint did charge that the total disability which the plaintiff suffered in 1918 was founded upon conditions which made it reasonably certain that it would continue throughout the plaintiff's life, and notwithstanding the fact that the complaint alleged that the plaintiff was totally and permanently disabled from October 31, 1918, until January 1, 1929, thus taking the view that the word "permanent" as used in war risk insurance must be construed in its literal sense as meaning absolute, unchanging and forever.

A search through the various sources such as statements by executive heads, committee chairmen, and members of Congress and the Acts of Congress and the regulations clearly shows that it was intended that a veteran could be permanently and totally disabled and then recover from such total and permanent disability.

Long prior to the enactment of the amendments to the original War Risk Insurance Act, which amendments were enacted on October 6, 1917, the question of insurance was prominently in the minds of the executive officers of the United States, and in this connection we quote

from the letter of the Honorable W. G. McAdoo, then Secretary of the Treasury, to the then President of the United States, written July 31, 1917, and which was incorporated in the Congressional Record of the 65th Congress, Volume 55, page 6901, as follows:

> "We are not relying upon the volunteer system in this war. We are drafting men and compelling them to make, if necessary, the supreme sacrifice for their country. A higher obligation rests upon the government to mitigate the horrors of war for the fighting men and their dependents, insofar as it is possible to do so, through compensations, indemnities, and insurance. Less than this a just, generous, and humane government cannot do. We must set an example to the world, not alone in the ideals for which we fight, but in the treatment we accord to those who fight and sacrifice for us."

This was an expression by the Secretary of the Treasury, who was to have and did have the administration of the War Risk Insurance Act, until the Veterans Bureau was created by an Act of Congress on August 9, 1921.

Mr. McAdoo was not merely expressing the sentiments of an executive offcer of the Government, but the ideals and sentiments of the American people.

The Act of War Risk Insurance of October 6, 1917 (40 Stat. 409) provided that war risk insurance was to be granted to members of our armed forces against the death or total and permanent disability of the insured, and provided among other things:

> "The United States upon application to the Bureau and without medical examination shall grant insurance against the death or total permanent disability of any person. * * * *"

and also in providing for the benefits under said policy stated:

> "It shall be payable only to spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them."
>
> (40 Stat. 409).

It will be observed that in the original Act Congress first used the phrase that the soldiers were to be insured against the death or "total permanent disability" and then in the same Act provided that the insurance benefits should be paid to a certain limited number of persons "and also during total and permanent disability to the injured person," Surely had Congress intended that before a soldier could receive the benefits of his insurance under the total and permanent disability provision contained in the statute, it would have used words connoting eternal forever, or everlasting and would not have used the word "during" in the above quoted part of the statute.

The definition of the word "during" contained in the Century Dictionary is as follows:

> "In the time of; in the course of; throughout the continuance of:

Century Dictionary and Cyclopedia, Volume 3, page 1802.

Webster's Dictionary defines the word "during" as:

"In the time of; as long as the action or existence of."

Can it be conceivable that Congress meant that in order for the benefits of the insurance policy to be paid to the veteran that he must not only be totally disabled, but that he must be in such condition that there could be no possible recovery from his condition of total disability when it used the words "during total and permanent disability." Had Congress intended that the contract of insurance should be payable only in case of a total disability based upon conditions from which it was impossible to recover and from which there could be no recovery, it would have used words clearly indicating that idea rather than using the words which imply a time limit and rather than using the word "during" which implies a beginning and an ending and is one of the units of measurement.

Again the Congress of the United States recognized that total and permanent disability was not an absolute unchanging condition, for it provided:

"In case where an insured, whose yearly renewable term insurance has matured by reason of total and permanent disability, *is found and declared to be no longer permanently and totally disabled*, and where the insured is required under regulations to renew payment of premiums on said term insurance,

and where this contingency is extended beyond the period during which said yearly renewable term insurance otherwise must be converted, there shall be given such insured an additional period of two years from the date on which he is required to renew payment of premiums in which to convert said term insurance, as hereinbefore provided." (Italics ours).

Paragraph 512, page 248 of Title 38, U. S. C. A.

Why did Congress provide for the resumption of the payment of premiums as contained in the above section if the word "permanent" as used in the definition of total and permanent disability was absolute? Why did Congress use the words "In case where an insured, whose yearly renewable term insurance has matured by reason of total and permanent disability, is found and declared to be no longer permanently and totally disabled" if it were impossible for him to have become totally and permanently disabled and recover from it? Logic and reasoning lead conclusively to the proposition that under war risk insurance, it is possible for the insured to be totally and permanently disabled to such an extent as to entitle him to payments and then to recover from the total disability to such an extent that he is no longer totally and permanently disabled. If this were not the case, Congress would never have enacted the above provisions of the statute.

This Act, enacted October 6, 1917, was drafted by a committee selected for that purpose and the Honorable Julian W. Mack, for many years a distinguished member

of the Circuit Court of Appeals for the Seventh Circuit, who was known as a national figure not only because of his service while on the circuit bench of the Seventh Circuit Court, but because of his ability as an instructor in the law, served as Chairman of the Committee that drafted the War Risk Insurance Act. As early as October 16, 1917, a conference was called at Washington. D. C., at which conference the Honorable Julian W. Mack presided, it being a conference between Mr. Mack, the man who drafted the War Risk Insurance Act, and such members of the United States Army as could attend. The result of this conference was published as Bulletin No. 3 of the War Risk Insurance Act under date of October 16, 1917, and is to be found in Volume 2 of the Regulations and Procedure of the United States Veterans Bureau at page 1241 to page 1273, and this Bulletin is entitled

> "Explanation submitted by the Honorable Julian W. Mack of the provisions of the military and naval insurance act presented at a conference of officers and enlisted men of the army and navy held in Washington on October 16, 17, and 18, 1917. This explanation has the full approval of the Bureau of War Risk Insurance.
>
> WILLIAM C. DELANOY,
> Director.
>
> Approved:
> W. G. MCADOO,
> Secretary of the Treasury."

In that conference, the Honorable Julian W. Mack stated in regard to war risk insurance:

> "Then, another provision that the Government generously added: While it based the premiums upon these extremely low term rates, it added this provision that not only on a man's death should the policy nature, but also on his becoming totally and permanently disabled. This has nothing at all to do with the compensation provision. You pay nothing for that. The compensation is given only if the injuries are received in the line of duty. Your insurance against total disability or death is against total disability or death, no matter how it arises or when it arises, whether in the service or out of the service, because of the service or not because of the service. It is like insurance in any private company and covers all contingencies. But, as I say, added to the life insurance, the Government throws in for good measure the provision that if before death you become totally and permanently disabled, the policy will then become due."

Bulletin No. 3, Bureau of War Risk Insurance, Volume 2, Regulations and Procedure, U. S. Veterans Bureau at page 1258.

At this same conference, a member of the conference asked Judge Mack the following question:

> "Your statement, Judge, of total permanent disability—suppose a man is pronounced totally and

permanently disabled by a board of physicians, and thereafter it develops that he has recovered somewhat. Would he still be considered under that condition, or would that word "permanent" come in, and if so, what is the effect?

Judge Mack: That is a problem.

A Member: That's got to be settled.

Judge Mack: And I think the Bureau will settle the problem liberally."

Bulletin No. 3, Bureau of War Risk Insurance, Volume 2, Regulations and Procedure, U. S. Veterans Bureau, at page 1265.

The Bureau did settle the problem liberally by issuing Regulation No. 11, which was promulgated March 9th, 1919, and which is as follows:

(TREASURY DECISION 20, W. R.)

TOTAL DISABILITY

Regulation No. 11 relating to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent.

TREASURY DEPARTMENT
Bureau of War Risk Insurance

Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following regu-

lation is issued relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

"Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV to be total disability.

"Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

"Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantial gainful occupation, the payment of installments of insurance shall be discontinued forthwith, and no further installments thereof shall be paid so long as such recovered ability shall continue."

WILLIAM C. DELANOY,
Director.

Approved:
W. G. MCADOO,
Secretary of the Treasury.

Regulations and Procedure United States Veterans Bureau, Part 1, Page 9.

We urge that the word "permanent" as used in the Statute and as defined in Regulation No. 11 is not to be construed in its literal sense, but is to be construed in its ordinary sense.

We urge that it is implied by the definition of total and permanent disability as contained in Regulation No. 11 that it is possible for a disabled person to be totally and permanently disabled and yet recover from the condition of being totally and permanently disabled. If this were not true, the regulation would not have provided for the cessation of the payment of installments upon the recovery of the ability of the disabled veteran to follow continuously any substantially gainful occupation.

It was the intention of Congress and also of the Director of the Bureau of War Risk Insurance, when Regulation No. 11 was issued, that the insurance contracted for would be payable at or upon discharge in the event that the insured was prevented from following continuously any substantially gainful occupation, and his physical disability was based upon conditions which rendered it reasonably certain that such disability would continue throughout the life of the insured. This is borne out by the fact that Regulation No. 11 provides among other things:

> "Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered, etc."

The regulation itself provides that no insurance shall be paid except on the ground 'that the insured has become totally and permanently disabled" and yet provides that when it shall be established that he "has recovered the ability to continuously follow any substantially gainful occupation" the payment of installments of insurance shall cease.

So that in any case of total and permanent disability, within this regulation, it may always be possible for the insured to recover the ability to follow continuously any substantially gainful occupation, and since this is true, if at any time while the insurance is in effect the insured becomes totally disabled and the conditions at that time make it reasonably certain that his disability will continue throughout his life, the insurance becomes payable regardless of the fact that in the future he may recover, or as in this case, after a period of eleven years, did actually recover the ability to follow a substantially gainful occupation.

It will be borne in mind in this connection that the provision regarding the cessation of the payment of installments was not made for a case in which a mistake had been made in regard to the original award of the insurance and was not intended to cover a case where the insured had not actually been totally and permanently disabled, because the regulation in covering the situation said that whenever it shall be established that any person to whom any installment of insurance has been paid "on the ground that the insured has become totally and perma-

nently disabled," and the only way that any insurance could be paid under that regulation was that the insured became totally and permanently disabled. However, the regulation goes on to say that where the insured "has recovered the ability to follow continuously any substantially gainful occupation the payments of insurance shall be discontinued." In other words this regulation means that if the plaintiff in this action, while his insurance was in force and effect, became totally disabled and the conditions surrounding his disability were such that it was reasonably certain that it would continue throughout his life, that the insurance became due him at that time and that he was entitled to such payments so long as that condition continued.

For the Court upon this complaint as it now stands to say that no cause of action is stated would be to discriminate between the plaintiff in this action and all of those who have been awarded insurance and have had that insurance paid in installments and have since been found not to be totally and permanently disabled, or have recovered their ability to follow continuously a substantially gainful occupation.

As early as November 26, 1920, the Bureau of War Risk Insurance recognized that the inability to engage continuously in an occupation for a period of six months raised a presumption of permanent total disability and promulgated Regulation No. 57, wherein it was provided under Subdivision B thereof:

"The procedure in making permanent total disability ratings for purposes of insurance, or compensation, or both shall be as follows:

* * * * *

"Where the disabled person on the date of the issuance of this regulation or hereafter shall be either an inmate of a hospital or asylum during a continuous period of six months or more, or on the date of this regulation is or hereafter shall be rated as totally disabled or totally and temporarily disabled for a continuous period of six months or more and be unable to follow continuously any substantially gainful occupation during such six months, and in addition at the time of the medical examination hereinafter prescribed, shall be found to be in such physical or mental condition as to require further hospitalization or otherwise unable to follow continuously any substantially gainful occupation."

Regulation No. 57, Part I, Regulations and Procedure, U. S. Veterans Bureau, page 54.

Subdivision 8 of Regulation 57 provides as follows:

"All terminations of an existing total permanent disability award for compensation and insurance purposes and all reductions thereof shall be effective the last day, inclusive, of the month in which the revised award is made, regardless of the date of the revised rating. When an award of total permanent disability is terminated under a contract of insu-

rance, the insured should be forthwith notified of the fact and advised that his premium must henceforth be paid if the remaining insurance is to continue in force, and advised of the amount and due date of the monthly premium, and shall be allowed the usual grace period of 31 days from the effective date of the discontinuance of such total and permanent disability payments under the contract of insurance."

It will be noted from the above regulation that the Bureau of War Risk Insurance on November 26, 1920, and at a time when the plaintiff in this case was totally disabled beyond any question passed a regulation providing that a veteran should be rated as totally and permanently disabled for purposes of insurance, where the disabled person shall "on the date of this regulation is or hereafter shall be rated as totally disabled or totally and temporarily disabled for a continuous period of six months or more and be unable to follow continuously any substantially gainful occupation during such six months, and in addition at the time of the medical examination hereinafter prescribed, shall be found to be in such physical or mental condition as to require further hospitalization or otherwise unable to follow continuously any substantially gainful occupation." A clear import of this regulation is that any one who had a continuous total disability for a period of six months and at the end of the six months was unable to follow continuously any substantially gainful occupation should be rated as permanently and totally disabled, and at the very time that this regulation was passed

the plaintiff was suffering from a total disability and had suffered continuously therefrom since October 31, 1918, or a period of more than two years before the promulgation of the above regulation, and continued to be totally and permanently disabled for a period of more than eight years after the regulation was issued, and it is still contended that he should not be considered as ever having been totally and permanently disabled for insurance purposes.

It will be noted again that Regulation No. 57 provides for a grace period of thirty-one days and for notification of the insured when his award of total and permanent disability is terminated under the contract of insurance. All of these provisions certainly imply that it is possible for one to be totally and permanently disabled and secure the benefits of the term insurance provided for soldiers and for him to cease to be totally and permanently disabled.

This court has affirmed many judgments allowing a recovery upon war risk insurance on the ground that the veteran was totally and permanently disabled. Suppose in one of those cases the insured becomes rehabilitated and like the plaintiff in the case at bar becomes able to follow a gainful occupation, does such a veteran have to refund what has been paid him? Does he lose his right to keep his insurance in force? Obviously not. And this plaintiff should not be discriminated against.

A leading case upon this entire subject is that of Penn Mutual Life Insurance Company v. Milton, 127 S. E. 140. In that case the policy provided for the discontinu-

ance of premiums "which thereafter may become due under this policy during the continuance of the said total disability of the insured," and also provided for certain monthly payments upon proof that the insured "has become wholly disabled by bodily injury or disease, so that he is and thereby will be permanently and continuously unable to engage in any occupation whatever for remuneration or profit, and that such disability has existed continuously for not less than sixty days prior to the furnishing of proof, thereupon the company will grant certain benefits." The precise question decided by the Supreme Court of Georgia was this:

> "Could a disability which has lasted for only 16 months, and from which the insured then recovered, be a permanent disability within the meaning of these clauses of the policy?"

It will be noted that in the Georgia case the man was totally disabled for only a period of 16 months and after the court stated the principle that an insurance policy must be liberally construed, said:

> "With these legal signposts for our guidance, what is the proper construction of the above provision of this policy? Does the language, 'permanently and continuously,' mean that the total disability must last forever before the insured will be entitled to the benefits provided in the policy? 'Permanent' is the antithesis of 'temporary.' The word 'permanent' does not always mean forever, or lasting for-

ever. The meaning of that word is to be construed according to its nature and in its relation to the subject-matter of the contract. Mead v. Ballard, 7 Wall. 290, 19 L. Ed. 190; Texas & P. R. Co. v. Marshall, 136 U. S. 393, 34 L. Ed. 385, 10 Sup. Ct. Rep. 846. The words 'permanently and continuously,' standing alone, would mean that the total disability must be a lasting one; but when these words are taken in connection with other language used in the several provisions of the policy set out above, the fair construction of these words is, not that the total disability shall last or exist forever, but that a disability which existed continuously for no less than 60 days prior to the furnishing of proof is, within the meaning of the policy, a 'permanent disability.' * * *

"This language clearly indicates that the insurer meant that the total disability, on proof of which it would grant the benefits named, was not one which might last during the entire life of the insured, but one which might end prior to his death. So we are of the opinion that under the terms of this policy a total disability which lasted for sixteen months was a 'permanent disability,' in the meaning of the above provisions of this policy."

Penn Mutual Life Insurance Company v. Milton, 127 S. E. 140.

We take it that the above cited case is directly in point and involving facts that are much more favorable to the insurance company than the facts in this case.

Another case which we believe to be directly in point is that of Wenstrom vs. Aetna Life Insurance Company, decided by the Supreme Court of North Dakota August 18, 1927, and reported in 215 N. W. at 93, and in this case it appeared that the insured did recover but had been totally disabled and the policy contained the provision that the company 'will pay to the life beneficiary the sum of $10 for each thousand dollars of the sum insured, and will pay the same sum on the same day of every month thereafter during the lifetime, and during such disability of the insured." The decision was based upon the words "and during such disability of the insured," and the Court in passing upon the matter held as follows:

> "That is the meaning of this phrase, 'during the lifetime, and during such disability of the insured'? If the disability must be incurable and continue during the life of the insured, it would be sufficient to say that the same sum would be paid on the same day of every month during the lifetime of the insured. Is not this provision in the policy the same as if the contract said, will pay the same sum on the same day of every month during the lifetime of the insured, or as long as he is disabled? We must assume that the phrase 'and during such disability of insured,' means something, and if it means anything it means that the amount will be paid during such

disability, whether it be for life, for years, or for months, and it would seem that it is placed there to cut off the indemnity in case the insured recovers. It is settled law that in construing insurance policies the language of the entire policy must be considered, and when capable of two constructions the most favorable to the insured must be given. Under this rule we are of the opinion that the words 'and during such disability of the insured,' qualifies the preceding language in that paragraph so as to permit a recovery when the disability is curable, but the indemnity ceases if the insured recovers. From this construction it follows that the insured is entitled to the indemnity during the entire period of his disability."

Wenstrom v. Aetna Life Insurance Company, 215 N. W. 93.

We submit, in view of the fact that the policy of insurance provides for a possibility of a recovery, and since the rule applicable to similar insurance policies issued by commercial companies is that even though the insured may have recovered at the time of the trial, he still is entitled to recover for the period that he was totally disabled, and in view of liberal construction that is to be placed upon this insurance and the statutes and regulations governing the same, that all that is involved in this case is a question of fact to be decided by the Court or

jury at the time of the trial, and that a cause of action has been stated, and that if the allegations of the complaint are established at the time of the trial that the plaintiff should be allowed to recover his monthly installments for the period of eleven years that he was totally and permanently disabled.

Respectfully submitted,

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